U.S.
1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, et al.,
Appellants,
vs.
RALPH A. MacMULLAN, Individually and as Director
Michigan Department of Natural Resources, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

BRIEF OF DOMINION MARINE ASSOCIATION AMICUS CURIAE

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BRIEF OF DOMINION MARINE ASSOCIATION AMICUS CURIAE

By written consent of Appellants and Appellees filed separately with this brief, Dominion Marine Assocation files this brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

Dominion Marine Association is an organization incorporated under the laws of the Dominion of Canada and located in Ottawa. The Association represents Canada's inland waters and coastal shipping fleet consisting of approximately 175 vessels of Canadian registry. Its member firms own and operate in the aggregate vessel tonnage in excess of 2,000,000 tons representing a total capital investment in excess of $500,000,000.00. The Association and its 21 member companies[1] will be as directly affected by the Michigan Watercraft Pollution Control Act of 1970 (Act 167, P. A. Mich. 1970; C.L. '48 §323.331, MSA §3.533 (201) et seq.) as will appellants.

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[1] Algoma Central Railway, Sault Ste. Marie, Ont.
Carryore Limited, Westmount, P.Q.
Imperial Oil Limited, Toronto, Ont.
Mohawk Navigation Company Limited, Winnipeg, Man.
Papachristidis Shipping Limited, Montreal, P.Q.
Westdale Shipping Ltd., Port Credit, Ont.
Transit Tankers and Terminals Limited, Montreal, P.Q.
Canada Cement Lafarge Limited, Montreal, P.Q.
Hall Corporation (Shipping) 1969 Ltd., Montreal, P.Q.
N. M. Paterson & Sons Limited, Fort William, Ont.
Scott Misener Steamships Limited, Port Colborne, Ont.
Shell Canada Limited, Toronto, Ont.
Upper Lakes Shipping Limited, Toronto, Ont.
Canada Steamship Lines Limited, Montreal, P.Q.
Hindman Transportation Company Limited, Owen Sound, Ont.
Gulf Oil Canada Limited, Toronto, Ont.
National Sand & Material Company, Toronto, Ont.
Quebec & Ontario Transportation Company Limited, Montreal, P.Q.
Texaco Canada Limited, Montreal, P.Q.
Yankcanuck Steamships Limited, Sault Ste., Marie, Ont.

ARGUMENT

The Association and its members are vitally concerned with the waters of the Great Lakes and the St. Lawrence Seaway. They are concerned not only with the navigability of such waters but with the quality as well. These members are engaged in the business of providing vessel transportation of cargo throughout the Great Lakes and the St. Lawrence Seaway. They not only make extensive use of the waters of the Great Lakes for the purpose of carrying essential raw materials, but in the course of such transportation also use considerable quantities of such waters for the personal needs of crew members of vessels. And the individuals employed by member companies living, as they do, in the Great Lakes—St. Lawrence area share every human's desire for environmental protection and ecological preservation. In the course of their businesses many, indeed most, of the vessels owned and operated by the members of the Association necessarily traverse the territorial waters not only of the State of Michigan, but also of the other seven states and two Canadian provinces bordering the Great Lakes-St. Lawrence System.

As substantial users of the water of the Great Lakes-St. Lawrence System the members of the Dominion Marine Association recognize, as all of us must, that over years of abuse from many sources pollution of the Great Lakes has occurred to a shocking extent and that a broad-based, frontal attack on the problem is needed to reverse the trend and hopefully save the Lakes. They recognize also that while the trend perhaps can be reversed overnight, the problems of Great Lakes pollution cannot be cured overnight. Practical, economically feasible, uniform and fair solu-

tions within the limits of available technology are required. In the zeal to make the environment right, however, factories cannot be closed by regulation adopted today because they emit smoke tomorrow. Time and technology, as well as regulation, are a necessary, indeed Constitutional, part of the cure.

The State of Michigan in its desire for clean water, rather than attacking the problem by comprehensive legislation addressed to all forms of pollution, has singled out one source—watercraft—by its Michigan Watercraft Pollution Control Act of 1970, (Act 167, Public Acts 1970, C.L. '48, §323.331, M.S.A. §3.533 (201) et seq.). Insofar as the discharge of vessel sewage is concerned, that Act seeks to prohibit discharge of sewage from commercial vessels, "domestic or foreign", into Michigan waters and to require such vessels to be equipped with holding tanks or incinerating devices. Holding tanks are then to be emptied into shoreside disposal facilities, admittedly non-existent at the present time.

Dominion Marine Association firmly believes, however, that the proper attack on Great Lakes pollution generally and vessel sewage specifically from a Constitutional and practical standpoint can only come at the international, diplomatic level of the governments of both the United States and Canada, perhaps through the machinery of the International Joint Commission ("IJC"), already hard at work on the problem acting under the Boundary Waters Treaty between the United States and Canada of 1909, 36 Stat. 2448, Treaty Series No. 548.

> "There is no doubt that contaminants entering Lake Erie and Lake Ontario from one country move across the boundary and affect the water quality in the other country. Extensive current metre surveys, the movements of drift objects and the uniform dis-

tribution of chemicals in the waters of both lakes attest to that fact."[2]

If not international, then at the very least the regulation of commercial ship waste disposal is national in scope requiring uniformity of standard and regulation. For this reason Dominion Marine Association supports the various Constitutional objections urged by the plaintiffs against the validity and enforceability of the Michigan Watercraft Pollution Control Act of 1970. Notwithstanding its understandable desire for clean water, Michigan may not, in its effort to achieve this end, burden or impair the free flow of commerce as it has done with the adoption of the legislation in question.

I.

The Constitutional Need For Uniformity of Regulation

It is obvious that in areas affecting interstate and foreign commerce the need for uniformity of regulation of the vehicles of such commerce is paramount. When the federal government acts in such areas it pre-empts or occupies the field to the exclusion of conflicting or even compatible state legislation of the same subject. Federal supremacy thus takes over to the nullification of perhaps otherwise valid state legislation.

By the adoption of the Water Quality Improvement Act of 1970, (33 U.S.C. §1151 et seq.), Congress, we submit, has occupied the field insofar as the control of sewage from commercial vessels is concerned. (See 33 U.S.C.A.

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[2] Report of International Joint Commission, Canada and United States, *Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River*, December 9, 1970 (hereinafter "IJC Report") at page 23.

§1163.) In so doing, Congress has expressly recognized the need for uniform standards of performance for marine sanitation devices and uniform regulation of the design, construction, installation and operation of any marine sanitation device on board commercial vessels.

In its occupation of this field, Congress has also recognized the need for granting shipowners time for compliance with standards and regulations (two years for new vessels, five years for existing vessels)—obviously with due process and economic considerations in mind. Michigan has not done so, but rather has given its Act immediate effect even though there are no pump out facilities available in Michigan in which to discharge waste accumulated in required vessel sanitary holding tanks. It is submitted that this Congressional recognition of the need for such time for compliance is, of itself, such occupation and pre-emption of the subject as to preclude state regulation of the subject of marine sanitation devices in the meantime. Federal policy on compliance has been expressed; states are not free to express a different policy—shorter or longer—on compliance. Cf. *Teamsters Union v. Oliver,* 358 U.S. 283.

But whatever may be said of Congressional occupation or pre-emption of the field in respect to marine sanitation devices and vessel waste disposal systems, it is evident that the need for uniformity of regulation of this subject is so clear that state action, such as the Michigan Act under consideration here, must fall whether or not Congress has acted. *Kelly v. Washington,* 302 U.S. 1, 14:

> "The remaining question is whether the state law must fall in its entirety not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required, and hence, whether or not Congress has acted, the state is without authority. *Cooley v. Board of Wardens,* 12 How. 299, 319; Minnesota Rate Cases, 230 U.S. 352, 399, 400.

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, *Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the states. The state of Washington might prescribe standards, designs, equipment, and rules of one sort, Oregon another, California another, and so on.*" (Emphasis added)

The subject of marine sanitation devices on commercial vessels cannot admit of diverse state action. As noted in *Kelley v. Washington,* the state of Michigan might prescribe one standard, Wisconsin another, Ohio still another, and so on throughout the Great Lakes border states and provinces. If Wisconsin, for example, would require only holding tanks, vessels with incinerating devices equipped to comply with the Michigan Act would not comply with Wisconsin's. If these Acts are valid, cannot Ohio require a sewage treatment facility aboard ships and Minnesota something else and Pennsylvania yet another "cure"? To pose the question is to answer it.

> "Vehicles equipped to meet the standards of the Illinois statute would not comply with the Arkansas standards, and vice versa. Thus, if a trailer is to be operated in both States, mudguards would have to be interchanged causing a significant delay in an operation where prompt movement may be of the essence." *Bibb v. Navajo Freight Lines,* 359 U.S. 520.

In the *Bibb* case the question was whether an Illinois statute requiring contour mudguards on highway trucks

and trailers conflicted with the Commerce Clause of the Constitution. A three-judge court concluded that the Illinois statute unreasonably burdened and obstructed interstate commerce because it made the conventional mudflap illegal in Illinois and because the statute, taken together with a Rule of the Arkansas Commerce Commission requiring straight mudflaps, "rendered the use of the same motor vehicle equipment in both States impossible". The Supreme Court affirmed and, in addition to the quote above, said:

> "Like any local law that conflicts with Federal regulatory measures * * *, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow."

It was not that Congress had occupied or preempted the field that moved the Court in *Bibb* to strike down the Illinois statute; it was that the subject demanded uniformity of regulation. Such is the case here. Such was also the case in *Morgan v. Virginia,* 328 U.S. 373, where a local law required the reseating of passengers on interstate buses entering Virginia in order to comply with a local segregation law. The Court struck down the reseating law, holding that diverse seating arrangements for people of different races imposed by several states interfered with "* * * the need for national uniformity in the regulation for interstate travel".

So it is here, that not only is the need for uniformity supported by the interstate commercial aspects of the situation, it is also supported by the long standing principle that in matters maritime in nature the need for harmonious and uniform rules applicable throughout every part of the country is paramount to state regulation. The *Lottawanna,* 2 Wall. 558; *Southern Pacific Co. v. Jensen,* 244 U.S. 205 and *Knickerbocher Ice Co. v. Stewart,* 253 U.S. 149.

It is the Constitutional grant of admiralty jurisdiction which serves as the basis for this doctrine of uniformity in maritime matters and which precludes state action even in the exercise of state police power.

> "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment." *Sinat v. Davenport,* 63 U.S. (22 How.) 227.

This is not to say that the states are without all power to regulate vehicles of interstate commerce. Reserved to the states is the valid exercise of police power in fields not pre-empted or occupied by Congress and in areas not demanding uniformity of regulation and where local regulation does not impede the free flow of commerce. A reasonable harbor fee exacted by a state on vessels entering a local port to defray the cost of local regulation of harbor traffic was sustained in *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, where such regulation did not impede the free flow of commerce and was not made the subject of regulation by Congress. In *Cushing v. The John Fraser,* 62 U.S. 184, a local regulation of dockage and anchorage in the Port of Charleston was upheld. And local quarantine laws applying to vessels engaged in interstate or foreign commerce are recognized as a valid exercise of police power until displaced by some legislation of Congress. *Morgan Steamship Co. v. Louisiana,* 118 U.S. 465; *Norris v. Boston,* 48 U.S. (7 How.) 283. A pilot fee, *Cooley v.*

Board of Wardens, 12 How. 299, and wharfage tolls, *Parkersburg & O. River Transp. Co. v. Parkersburg,* 107 U.S. 691 may be charged. The emission of smoke from vessels may even be regulated where the local regulation does not prescribe the type of equipment vessels must have. *Huron Cement Co. v. Detroit,* 362 U.S. 440.

The regulations covered by these cases, being purely local in character and not impeding the free flow of commerce, are no authority for Michigan's attempt to prescribe equipment for vessels engaged in interstate and foreign commerce. *Bibb v. Navajo Freight Lines* and *Kelly v. Washington, supra,* make it clear that Michigan may not do so. The power of Congress to regulate is—

> "* * * necessarily exclusive whenever the subject matter is national in character and properly admits of only one uniform system. * * * Interstate commerce carried on by ships on the sea is surely of this character." *Phila. Steamship Co. v. Pennsylvania,* 122 U.S. 326.

It is to be anticipated that *Huron Cement Co. v. Detroit,* 362 U.S. 440, which upheld the application of the Detroit smoke emission ordinance to vessels engaged in interstate commerce will be urged in support of Michigan's Watercraft Pollution Control Act of 1970. The *Huron Cement* case is clearly distinguishable. First and foremost, the Detroit smoke ordinance did not prescribe a type or types of equipment required for vessels. While vessel equipment had to be inspected and certified, there was no showing in the record of any attempt to enforce this provision and, accordingly the Court in footnote 1 expressly left open the question of the validity of the inspection and certification provisions (hinting, we submit, at invalidity). Further, there was no Federal regulation on the emission of smoke

from vessels. The Federal inspection laws which were urged as showing occupation of the field had to do with safety of ships, passengers and crew from the perils of maritime navigation, and not with the elimination of air pollution. Except for State inspection and certification, the foregoing features, the absence of which sustained the Detroit smoke ordinance, are present here. The Michigan Act prescribes specific types of marine sanitation devices and there is a Federal Act on the specific subject of marine sanitation devices, 33 U.S.C.A. §1163.

We submit that the need for uniformity cannot be doubted and for this reason the Michigan Act—albeit noble of purpose—must fall. As the International Joint Commission said only one year ago (IJC Report p. 108 and 110):

> "The waters of the Lower Great Lakes and the International Section of the St. Lawrence River lie within both the United States and Canada, and also within the States of Michigan, Ohio, and New York, and the Commonwealth of Pennsylvania and the Province of Ontario. All seven of these jurisdictions have laws relating to the prevention or control of pollution of that portion of the waters situated in their territory, and governmental agencies responsible for administering those laws. As might be expected in such circumstances, the policies and goals and the vigour with which they are pursued in the several jurisdictions are not uniform; and there is considerable variation in the actual laws, their administration and enforcement."
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> * * * * *
>
> "While in some cases the differences among jurisdictions are more apparent than real, in others the differences are such that the laws as applied in the various jurisdictions are incompatible. Obviously such inconsistency presents serious obstacles to the effective implementation of any concerted programme of pollution control and abatement throughout the Lower Great Lakes."

II.

Effect Of Boundary Waters Treaty Of 1909 Between The United States and Canada

What has been said should not be taken as an admission or recognition by Dominion Marine Association of the power of even the Congress of the United States—unless acting pursuant to or in furtherance of an international agreement—to legislate, or the power of the U. S. Federal government to regulate, in areas of marine sanitation devices of, and sewage discharge from, Canadian registry vessels plying the Great Lakes. This, *amicus curiae,* while pointing out above the need for and law requiring national uniformity, goes one step further and urges that the situation demands and the law requires international uniformity. For this reason as well the Michigan Act is invalid.

In 1909 the United States and Great Britain entered into the Boundary Waters Treaty between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548. That Treaty provides in Article I[3] that the parties agree that navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships of both countries equally, subject to laws and regulations of either country not inconsistent with the privilege of free navigation.

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[3] "The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

We submit, this Article clearly precludes state action such as the Michigan Act in question. It may permit Federal action (* * * subject * * * to any laws and regulations of either country * * *") but, by its failure to mention state laws or regulations in Article I, its intention is clearly to prohibit Michigan from subjecting to fines persons who operate vessels in boundary waters when their vessels do not comply with the Michigan Act.

Article IV of the Treaty provides:

> "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

Thus, the subject of pollution is a subject within the scope of the Treaty; a recognition that pollution of international waters is a problem of international scope and importance.

That problem is being dealt with on the international level. The Treaty also provides in Article VII for the establishment of an International Joint Commission. The IJC can resolve disputes in certain cases (Article VIII) and can examine, study and report on matters referred to it, giving conclusions and recommendations as may be appropriate (Article IX).

The IJC only a year ago completed an exhaustive study of pollution of Lakes Erie and Ontario and the international section of the St. Lawrence Seaway and has issued its Report under date of December 9, 1970. The document runs to 174 pages. Suffice to say that, among other things, "compatible" regulations are called for. It should also be emphasized that pursuant to recommendations of the IJC, diplomatic talks are underway on the subject of Great Lakes water quality improvement. See U.S. Department

of State press release No. 189 dated June 24, 1970 (Appendix A) pertaining to the Ministerial Meeting on Great Lakes pollution. It is important to note that:

> "* * * the Ministers concerned have agreed to achieve compatible regulations."

The supremacy of the national power in the field of foreign affairs is clearly mandated by the Constitution and cannot be doubted. *Hines v. Davidowitz,* 312 U.S. 52; *Zschernig v. Miller,* 389 U.S. 429. Nor can it be doubted that a treaty is the supreme law of the land.

> "* * * Our system of government is such that the interest of the cities, countries and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz, supra.*

In areas of international concern, such as boundary water cleanliness, where the subject is under consideration at the diplomatic level between two countries on either side of that boundary "[a]ny concurrent state power that may exist is restricted to the narrowest of limits." *Hines v. Davidowitz, supra.* That being so, the principle will not allow the instrusion of state legislation into the field of foreign affairs which the Constitution entrusts to the President and the Congress. *Zschernig v. Miller, supra.*

In its attempt to impose its sanitation equipment standards on foreign vessels, be they Canadian lakers or the many salt water vessels that ply the Lakes, Michigan clearly has overstepped its bounds and has sought to burden foreign commerce. It may not do so. *People v. Compagnie Generale Transatlantique,* 107 U.S. 59.

Especially is this so where a Treaty exists between two countries covering the subject of navigation and use of boundary waters between those two countries, and diplomatic efforts are in progress with a view to solution of the boundary water pollution problem common to both countries. This situation simply cannot admit of local regulation. Uniformity—international uniformity—is essential to the cure and proves the invalidity of Michigan's well intentioned effort.

CONCLUSION

The Michigan Watercraft Pollution Control Act of 1970 is in contravention of the United States Constitution for several reasons, including, we submit, occupation of the field by Federal legislation, the need for uniformity of regulation in the area sought to be regulated, and the existence of the Boundary Waters Treaty of 1909.

Respectfully submitted,

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APPENDIX A

DEPARTMENT OF STATE FOR THE PRESS

June 24, 1970 No. 189

Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution

(June 23, 1970)

Ministers and representatives of the governments of Canada and the United States met today in Ottawa to discuss common problems of pollution in the Great Lakes. The Canadian delegation included the Minister of Energy and Resources Management from the Province of Ontario. At the meeting they discussed each country's current plans, programs and legislation to improve water quality in the Great Lakes.

Ministers and representatives discussed the recommendations in a Special Report submitted in April by the International Joint Commission on potential oil pollution, eutrophication and pollution from watercraft. It was agreed:

a) The Canadian contingency plan for the Great Lakes for spills of oil and hazardous materials which will shortly come into operation, will be fully coordinated with the new United States plan.

b) Inputs of phospates into the Great Lakes should be reduced in order to arrest and reverse eutrophication of the Great Lakes. Canadian legislation will permit the Canadian Government to implement the Commission's recommendations for reducing and eliminating phosphates

from detergents and the Canadian Government has announced its intentions to take action that would meet IJC recommendations. Standards are in effect on the United States side of the Lakes which will require the achievement of an 80% removal of all phosphates from municipal and industrial sewage (including detergents) by 1973, and in advance of the target date of 1975 recommended by the Commission; the United States Government is continuing its intensive review of the removal of phosphates from detergents.

c) In both countries, legislation exists for the regulation of waste disposal by commercial vessels and pleasure craft; and the Ministers concerned have agreed to achieve compatible regulations.

It was noted that the Ontario Government intends to modify its gas drilling program on Lake Erie to conform to the recommendations of the Commission in the Special Report. There is no gas well drilling by Michigan, Ohio, New York or Pennsylvania in Lake Erie. It was further noted that phosphate removal facilities are being initiated by Ontario with a view to meeting the recommendations of the Commissioners.

Ministers and representatives expressed deep concern about the critical situation in the Great Lakes, and noted the determination of the Governments to take decisive action.

The Ministers have agreed to the establishment of a working group to consider common water quality objectives and implementing programs which may be proposed by either government to the working group. This working group will report back to this Ministerial Conference which will be reconvened subsequent to the final report of the IJC.

The United States delegation was led by the Honorable Russell E. Train, Chairman of the Council on Environment Quality; United States Ambassador Adolph Schmidt; Mr. Carl L. Klein, Assistant Secretary of Interior for Water Quality Research and Rear Admiral Robert W. Goehring, Chief of Operations, U. S. Coast Guard, who were accompanied by senior officials from the Department of State, the Department of the Interior, the Department of Transportation and the Council on Environmental Quality.

The Canadian delegation was led by the Honorable Mitchell Sharp, Secretary of State for External Affairs; the Honorable J. J. Greene, Minister of Energy, Mines and Resources; the Honorable J. Davis, Minister of Fisheries and Forestry; the Honorable Herb Gray, Minister without Portfolio and the Honorable George Kerr, Minister of Energy and Resources Management for Ontario.